Supreme Court, U.S.
FILED

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No. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM 1996

COMSOURCE INDEPENDENT FOOD SERVICE COMPANIES, INC.,

Respondent,

- against -

UNION PACIFIC RAILROAD COMPANY and MODESTO AND EMPIRE TRACTION COMPANY,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

BARRY N. GUTTERMAN
Counsel of Record &
Attorney for Petitioners
Union Pacific Railroad
Company and Modesto &
Empire Traction Company
Barry N. Gutterman & Associates
360 Lexington Avenue, 24th Floor
New York, New York 10017
(212) 983-1466

PRINTINGHOUSE PRESS 25 WEST 43RD STREET NEW YORK, NY 10036 (212) 719-0990

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ninth Circuit Court of Appeals' decision conflicts with the well established case law from other Appellate Circuits and with other District Court decisions, thereby adversely affecting a rule of national application where national uniformity is required.

2. Whether the Ninth Circuit Court of Appeals erred in applying the law relative to tariffs and the general principles of the Carmack Amendment, 49 U.S.C. 11707, to the shipment in the instant case which was transported pursuant to an exempt transportation agreement, 49 U.S.C. 10505(e).

3. Whether the Ninth Circuit Court of Appeals erred in concluding that this exempt transportation shipment, pursuant to the Staggers Amendment, 49 U.S.C. 10505(e), presented an issue of first impression in the Ninth Circuit in light of the case law precedent within the Ninth Circuit which clearly and unequivocally set forth the criteria for establishing liability terms and rates alternative to liability terms pursuant to the Carmack Amendment, 49 U.S.C. 11707.

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

Pursuant to Supreme Court Rule 29.6, upon information and belief, Respondent Comsource Independent Food Service Companies, Inc. is a corporation owned by approximately 100 food service and non-food distributors, all of which are privately held (with the exception of PYA Monarch which is a wholly-owned subsidiary of Sara Lee Corporation).

Petitioner Union Pacific Railroad Company is owned by Union Pacific Holdings Corp. Union Pacific Holdings Corp. is owned by Union Pacific Corporation, a publicly held corporation. No stockholder owns 10% or more of Union Pacific Corporation.

Petitioner Modesto and Empire Traction Company is a wholly owned subsidiary of Beard Land and Investment Company. Beard Land Improvement Company is a subsidiary of Modesto and Empire Traction Company. Shares of this company are not traded on any public exchange.

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IN THE

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OCTOBER TERM 1996

COMSOURCE INDEPENDENT FOOD SERVICE COMPANIES, INC.,

Respondent,

- against -

UNION PACIFIC RAILROAD COMPANY and MODESTO AND EMPIRE TRACTION COMPANY,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 16, 1996.

OPINION BELOW

The opinion of the Court of Appeals is reported at 102 F.3d 438 (9th Cir. 1996), and appears at Appendix B. The opinion of the District Court is not reported. It appears as Appendix A.

STATEMENT OF BASIS FOR JURISDICTION IN THIS COURT

(A) The opinion sought to be reviewed was entered on December 16, 1996. (App. B.).

(B) The Petition for Rehearing was denied on January 30, 1997 and the Suggestion for Rehearing En Banc was rejected on January 30, 1997. See Appendix C.

(C) This Court has jurisdiction to review the judgment entered by the Court of Appeals for the Ninth Circuit, on a writ of certiorari pursuant to Supreme Court Rule 10 on the ground that this opinion conflicts with the decisions of another United States Courts of Appeals on the same important matter and this decision involves an important question of federal law that has not been, but should be, settled by this Court, specifically the enforcement of alternative terms in exempt transportation contracts pursuant to the Staggers Amendment to the Interstate Commerce Act, 49 U.S.C. 10505(e).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED IN THE CASE

An interpretation of the Staggers Amendment to the Interstate Commerce Act, 49 U.S.C. 10505(e), is at issue in the instant matter.

STATEMENT OF THE CASE

The initial action was filed on or about December 18, 1992 by Respondent Comsource Independent Service Companies, Inc. ("Comsource") against Petitioner Union Pacific Railroad Company ("UP") and Christian Salveson, Inc. ("Salveson") for loss and damage to a shipment of frozen vegetables

transported in interstate commerce from Modesto, California to Independence, Missouri pursuant to an exempt transportation agreement. This was not a shipment transported by common carriage. Instead, it was an exempt shipment pursuant to the Staggers Amendment to the Interstate Commerce Act, 49 U.S.C. 10505(e). On May 18, 1993, Petitioner Modesto & Empire Traction Co. ("M&ET") was added as a defendant.

The shipment was initiated by Salveson, Comsource's agent, who typed out the terms and conditions of the bill of lading and specified that the subject shipment was pursuant to "Letter Quote UP-EBFF-3 $3,000." "UP-EBFF-3" is the abbreviation for Eastbound Frozen Foods Rate Sheet, which incorporated the rules and provisions of a contract entitled *UP EXEMPT 1-F Governing Publication for Exempt Perishable Food & Food Commodities, Processed Frozen & Refrigerated Foods and Animal Bi-products Shipped From, To or Via The Union Pacific Railroad Company and Subsidiaries* (the "Governing Publication"). Salveson initiated this shipment by sending a copy of the bill of lading via facsimile to M&ET. M&ET then confirmed the terms of the shipment elected by the shipper. If a shipper selects full Carmack terms, which the shipper did not do in this case, M&ET would verify the shipping rate. Freight rates for shipments pursuant to Carmack terms are significantly higher than freight rates for exempt shipments subject to the terms and conditions set forth in UP's Governing Publication.

Prior to initiating this shipment, Comsource was provided with a copy of the UP Governing Publication on September 25, 1990 and a copy of the rate sheet (UP-EBFF-3) in January 1991. Prior to initiating the shipment at issue in the case at bar,

UP fielded numerous telephone calls from Comsource with respect to rate charges for other shipments transported by UP.

Item 8 of the Governing Publication provided for alternative rates. The Governing Publication enumerated the option and election of full liability terms pursuant to the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. §11707. Item No. 8 of UP's Governing Publication stated that the statute of limitations, if Section 11707 [Carmack] liability terms were elected, is two years. However, Item 8 further provides that in the event that the shipper selects the rate pursuant to the liability terms contained in the Governing Publication, the time period for bringing suit against the railroad for loss and damage to the freight is one year. Item No. 8 of the Governing Publication provided:

> ITEM 8 LIABILITY PROVISIONS IF 49 U.S.C. § 11707 USED
>
> **Shipper may, at his option, elect that the shipment move under the liability provisions set forth in 49 U.S.C. § 11707.** In the event of such an election, the shipper shall place the following notation on the bill of lading: "This shipment subject to the liability provisions set forth in 49 U.S.C. § 11707." An additional charge is assessed on shipments for which the shipper elects "Section § 11707 liability." Information including the charges for "Section § 11707 liability" can be obtained by calling our toll free phone number. **Where the shipper elects the liability provisions set**

> **forth in 49 U.S.C. § 11707, the period for bringing suit against any carrier will also be affected in the following manner: Any suit must be commenced within two years (rather than one year as provided elsewhere in this circular)** from the date the carrier gives written notice that it has disallowed the claim or any part of the claim specified in the notice.

[Emphasis Added].

The Governing Publication further provided at Item No. 86:

> 1.b. Any matters not covered in this publication will be governed by the terms of the Uniform Bill of Lading, 49 U.S.C. § 11707 (Carmack), and 49 C.F.R. 1005.
>
> 1.c. Customers may, at their option, select liability provisions set forth in 49 U.S.C. Section 11707 (Carmack) as explained in Item 143. If 49 U.S.C. Section 11707 is not selected, the liability provisions of this Item will govern.

The Governing Publication provided for a one (1) year time period for suit to be filed following a denial of a claim. Specifically, the Governing Publication provided:

> All lawsuits must be filed within one (1) year of receipt of written notice from Union Pacific Railroad rejecting a claim either in full or in part.

Comsource filed a claim several months after the delivery of the frozen vegetables stating that the vegetables were either damaged while stored at Salveson's warehouse or while in the possession of the rail carriers. The rail carriers' shipping records confirmed that the frozen vegetables were maintained at the proper and appropriate temperature while in the rail carriers' possession. Consequently, on October 30, 1991, UP denied Comsource's claim. On December 28, 1992, almost one (1) year and two (2) months after UP denied Comsource's claim, Comsource filed suit against UP and Salveson. Approximately five (5) months thereafter, on May 18, 1993, M&ET was added as a defendant.

On or about March 1, 1994, Petitioners moved for summary judgment on the grounds that this lawsuit was time barred. On or about April 1, 1994, the Hon. Charles A. Legge, United States District Judge, denied Petitioners' motion for summary judgment and held that the two (2) year statute of limitations set forth in the Carmack Amendment applied. (App. A).

The parties entered into a Stipulated Judgment on March 23, 1995 in which Petitioners reserved their right to challenge and appeal the District Court's ruling on the motion for summary judgment. A notice of appeal was filed by Petitioners on April 21, 1995.

By its decision dated December 16, 1996 (App. B.), the Court of Appeals for the Ninth Circuit held that this was a matter of first impression and that the shipper must have reasonable notice of what the Court of Appeals classified as a non-mandatory tariff provision and that there was a genuine issue of material fact as to whether the shipper had sufficient

notice of the one (1) year time limit for filing suit. On January 30, 1997, the Petition for Rehearing was denied. (App. C).

The District Court had jurisdiction pursuant to federal question jurisdiction, 28 U.S.C. § 1331, based upon the fact that the Complaint alleged a cause of action pursuant to the Interstate Commerce Act, 49 U.S.C. 11707.

The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291 of a final decision of the District Court.

ARGUMENT

1. THE STAGGERS AMENDMENT, 49 U.S.C. 10505(e), AND THE DECISIONAL LAW THERETO, HAS BEEN COMPROMISED BY THE NINTH CIRCUIT COURT OF APPEAL'S DECISION IN A CRITICAL AREA OF NATIONAL IMPORTANCE WITH REGARD TO EXEMPT TRANSPORTATION CONTRACTS

The Court of Appeals decision is contrary to the well established case law precedent interpreting the Staggers Amendment, 49 U.S.C. 10505(e), which permits carriers and their customers to enter into agreements specifying certain terms and conditions, including limited liability terms in exchange for less expensive freight charges. *Cooperative Shippers v. Atchison, T. & S.F. R. Co.*, 840 F.2d 447 (7th Cir. 1988); *Yamazen U.S.A. v. Chicago & Northwestern Transp. Co.*, 790 F.2d 621 (7th Cir. 1980). The Staggers Amendment permits carriers and shippers to bargain for shorter periods within which to file lawsuits so long as shippers have the

option of selecting the two year filing period as set forth in the Carmack Amendment, 49 U.S.C. 11707. See e.g., *Yamazen U.S.A. v. Chicago & Northwestern Transp. Co., supra*, 790 F.2d at 623; *Atlantic Mutual Companies v. Orient Overseas Container Line a/k/a OOCL (USA), Inc.*, 1992 A.M.C. 2022, 2024 (W.D.Wa. 1992).

Congress enacted the Staggers Amendment to the Interstate Commerce Act, 49 U.S.C. §10505, which deregulated the railroad industry in part. The purpose of the Staggers Amendment was "to make railroads more competitive in interstate freight carriage." *Quasar Co. v. Atchison, T. & S.F. R. Co.*, 632 F.Supp. 1106, 1110 (N.D.Ill. 1986).

In enacting the Staggers Amendment, Congress:

> Acknowledged that federal regulation had contributed to the railroad industry's financial weakness, see Congressional Declaration of Findings, Staggers Act at §2 and directed the I.C.C. to exempt carriers from certain statutory regulation when regulation was not necessary to further national policy, when the transaction or service involved was of limited scope or when regulation was not needed to protect shippers from abuse of market power.

Yamazen U.S.A. v. Chicago & Northwestern Transp. Co., supra, 790 F.2d at 622. In order to effectuate this deregulation, Congress provided that neither the Carmack nor Staggers Amendments shall prevent rail carriers from offering alternative terms for liability and claims.

The instant case is akin to the majority of cases in which the courts have held that the contractual terms satisfy the requirements of the Staggers Amendment, 49 U.S.C. 10505(e). *See e.g., Cooperative Shippers v. Atchison, T. & S.F. R. Co., supra*; *Yamazen U.S.A. v. Chicago Northwestern Transp. Co., supra.*

Consideration of this matter by this Court is necessary to secure and maintain uniformity of the decisions in the Circuits. This decision is contrary to the holdings of other circuits and other district courts.

The issue at stake in this case affects tens of thousands of shipments per day and millions of shipments per year which are transported in interstate and international commerce and is a matter of national importance. For example, a conservative estimate by Petitioner UP indicates that at least 2.8 million deregulated shipments were transported pursuant to exempt transportation contracts negotiated in accordance with the Staggers Amendment by UP for the first ten months of 1996. This number does not reflect the millions of other exempt shipments handled annually by other rail carriers in interstate and international commerce. The decision of the Ninth Circuit Court of Appeals directly conflicts with decisions of other United States Courts of Appeals, substantially affects a rule of national and international application, and constitutes a question of exceptional importance since there is an overriding need for national uniformity involving exempt contracts for the transportation of shipments in interstate commerce pursuant to the Staggers Amendment to the Interstate Commerce Act, 49 U.S.C. 10505(e).

In addition, a material fact and the law thereto was overlooked by the Court of Appeals. (App. B.). Specifically,

the transportation of the shipment was not transported by common carriage subject to a carrier's filed tariff with the Interstate Commerce Commission, but instead was an exempt movement. The Court of Appeal's decision ignored this critical fact, the case law precedent, and additional decisions decided after the briefs were submitted (but provided to the panel prior to argument) and which reiterate the clear and unequivocal case law precedents supporting Petitioners' position, i.e. *C.R. England and Sons Inc. v. Atchison, T. & S.F. R. Co.*, 924 F.Supp. 757 (N.D. Tex. 1996); *Bay State Shippers, Inc. v. Atchison, T. & S.F. R. Co.*, 1995 U.S. Dist. Lexis 20154, 1995 WL 865481 (C.D.Cal. 1995).

For these reasons as well as the need of clarity and uniformity as to exempt transportation agreements pursuant to the Staggers Amendment to the Interstate Commerce Act 49 U.S.C. 10505(e), we respectfully urge the court to review the decision below.

II. THE NINTH CIRCUIT COURT OF APPEALS ERRED BY APPLYING THE LAW RELATIVE TO TARIFFS AND GENERAL PRINCIPLES OF THE CARMACK AMENDMENT, 49 U.S.C. 11707, TO THIS SHIPMENT TRANSPORTED PURSUANT TO AN EXEMPT TRANSPORTATION AGREEMENT AND PURSUANT TO THE STAGGERS AMENDMENT TO THE INTERSTATE COMMERCE ACT, 49 U.S.C. 10505(e), THEREBY DISREGARDING THE DECISIONS SET FORTH BY OTHER CIRCUITS AND OTHER DISTRICT COURTS.

The Staggers Amendment deregulated the railroad industry and sought to make rail shipments more competitive in the interstate transportation of freight. *Quasar Co. v. Atchison T. & S.F. R. Co., supra,* 632 F.Supp. at 1110. In enacting the Staggers Amendment, shippers, such as Comsource, and carriers, such as UP, were permitted to enter into contracts specifying terms and conditions relating to shipments, including less expensive freight charges in exchange for accepting certain liability conditions. *Cooperative Shippers v. Atchison T. & S.F. R. Co., supra.* These terms and conditions often include a requirement that lawsuits for loss and/or damage to cargo be instituted within a certain period of time. *Yamazen U.S.A. v. Chicago & Northwestern Transp. Co., supra.* UP's Governing Publication presents terms which satisfy the requirements of the Staggers Amendment particularly where, as here, Comsource chose the reduced shipping rate offered pursuant

to this governing publication by designating the rate which incorporated the terms and conditions of the governing publication on the bill of lading. *Atlantic Mutual Companies v. Orient Overseas Container Line a/k/a OOCL (USA), Inc., supra.* In the instant case, the time period within which to file suit was one year from the date of the disallowance of the claim.

In analyzing whether UP complied with the statutory requirements for negotiating alternative liability terms pursuant to the Staggers Amendment, the sole question should be whether the provisions in its governing publication or exempt circular offered alternative rates for the shipment. See e.g., *Cooperative Shippers v. Atchison, T. & S.F. R. Co., supra; Yamazen U.S.A. v. Chicago & Northwestern Transp. Co., supra.; Atlantic Mutual Companies v. Orient Overseas Container Line, a/k/a OOCL (USA), Inc., supra.* It is clear that pursuant to this well established case law, that UP offered alternative rates for the shipment. However, this issue was not addressed by the panel in its decision. (App. B).

Tens of thousands of shipments are transported on a daily basis by UP in interstate and international commerce. This is a matter of national importance in which there is a critical need for national uniformity.

The situation in the instant case involved a deregulated or exempt contract shipment. The analysis utilized by the court related to the general law with respect to a shipment transported by a carrier performing services as a common carrier regulated by the Interstate Commerce Commission pursuant to the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 11707. Specifically, the panel focused on whether the shipper, in this deregulated shipment,

took notice of a tariff filed with the Interstate Commerce Act. However, this case did not involve a filed tariff. Instead, the case at bar involved an exempt transportation contract between the parties regarding the transportation of the shipment. Comsource was sent a copy of the Governing Publication, UP Exempt 1-F, and the rate sheet prior to the shipment. As the Court properly noted, the rate sheet indicated that the shipment was pursuant to UP's Governing Publication. (App. B). The bill of lading prepared by Comsource's agent, Salveson, designated that the shipment was pursuant to the freight rate and the Governing Publication which provided for a period of one year within which to file a lawsuit.

The panel applied inapplicable cases which related to whether notice was given to the shipper by UP concerning the condition precedent in the Governing Publication (which the panel erroneously described as a tariff with a statute of limitation), rather than an analysis of UP's Governing Publication which applied to the deregulated shipment at issue.

UP's Governing Publication clearly specified that suits for freight loss and damage must be filed within one year. Instead, the panel addressed the well established case law with respect to a limitation of liability tariff in a regulated common carrier move, and not the requirement of filing a timely suit pursuant to an exempt transportation contract pursuant to the Staggers Amendment to the Interstate Commerce Act, 49 U.S.C. 10505(e). A carrier's Governing Publication is not a tariff; it contains contractual terms, including periods of limitations. *See e.g., Cooperative Shippers v. Atchison T. & S.F. R. Co., supra.* The case law relied upon by the panel dealt with tariff requirements pursuant to the Carmack Amendment involving

regulated shipments, not deregulated moves as in the case at bar, and such tariffs are inapplicable to the issues in the case at bar.

A. THE ONE YEAR PERIOD OF TIME FOR FILING SUIT CONTAINED IN UP'S GOVERNING PUBLICATION IS NOT A STATUTE OF LIMITATIONS. AS THE WELL ESTABLISHED CASE LAW PRECEDENT DEMONSTRATES, IT IS A CONDITION PRECEDENT FOR THE RECOVERY OF A FREIGHT LOSS AND DAMAGE CLAIM

Comsource's agent (Salveson) selected the freight rate and the limited liability associated with this cheaper rate. As the Court for the Western District of Washington held in *Atlantic Mutual Companies v. Orient Overseas Container Line a/k/a OOCL, Inc., supra*, by designating reduced shipping rates and specifying a contract rate on the bill of lading, the shipper agreed with the carrier to a one year limitations period from the date of delivery for initiating a lawsuit for cargo loss and damage. Even if a sophisticated commercial shipper such as plaintiff (as noted by the panel) failed to review the railroad's Governing Publication, it did so at its peril. The shipper, having deliberately elected to pay lower shipping rates, is proscribed from demanding the more favorable terms associated with higher rates and is bound by the shorter period for filing suit. *See e.g., Yamazen U.S.A. v. Chicago & Northwestern Transp. Co., supra*, 790 F.2d at 625.

Hughes Aircraft Co. v. North American Van Lines, Inc., 970 F.2d 609 (9th Cir. 1992) was discussed by the panel in the instant case. This case related to the requirements for a

released value rate pursuant to a common carrier's tariff filed with the Interstate Commerce Commission. However, this decision did not address exempt shipping contracts such as the contract in question which was pursuant to the Staggers Amendment, 49 U.S.C. 10505(e). However, the Ninth Circuit Court of Appeals in *Hughes Aircraft* held that where a shipper prepared a bill of lading which designated a freight rate and which provided a limitation of liability, the shipper is proscribed from using its purported ignorance as a shield to exonerate itself from more restrictive liability provisions.

III. THERE HAVE BEEN RECENT DECISIONS WHICH WERE DECIDED AFTER THE CASE WAS SUBMITTED AND WHICH DEMONSTRATE A CHANGE IN THE LAW AND WHICH APPEAR TO HAVE BEEN OVER-LOOKED BY THE PANEL

A. THE DECISIONS IN *BAY STATE SHIPPERS AND C.R. ENGLAND*, DECIDED AFTER THE INITIAL BRIEFING AND SUBMITTED TO THE PANEL, REITERATE THE LAW OF THE CIRCUITS THAT THE PETITIONER'S ACTION IN THE CASE AT BAR IS TIME BARRED

Two recent decisions, decided and cited to the Court of Appeals subsequent to the submission of the parties' briefs and prior to oral argument in Petitioners' Presentation of Additional Case Citations dated July 22, 1996, have upheld the validity of rail carriers' exempt circulars or Governing

Publications. Specifically, the cases address the provisions of the rail carriers' Governing Publication which require that the shipper commence a civil action within one year to recover for alleged damage to goods transported in interstate commerce in situations identical to the case at bar. *See Bay State Shippers, Inc. v. Atchison T. & S.F. R. Co., supra*; *C.R. England and Sons, Inc. v. Atchison, T. & S.F. R. Co., supra.*

In *Bay State Shippers, Inc. v. Atchison T. & S.F. R. Co.*, the shipper contracted with the rail carrier, the Atchison, Topeka and Santa Fe Railway ("ATSF"), for the transport of goods from Chicago, Illinois to Visalia, California. The train derailed and two of the shipper's containers were damaged. An Act of God defense was asserted and a motion to dismiss was filed by ATSF on the ground that the complaint was not timely filed within one year as required in the railroad's exempt circular. (The same one year period to file suit was in the case at bar.) The Central District Court of California granted ATSF's Motion to Dismiss and: (1) held that the contract provided alternative rate terms for Carmack Amendment liability (at an additional charge of five percent of the applicable freight charges assessed, or $100.00 per shipment, whichever is greater); (2) rejected the shipper's argument that it was not aware of the alternative terms since the shipper had been doing business with ATSF for three years and the shipper's President signed the exempt transportation contract; (3) followed the Seventh Circuit Court of Appeal's decision in *Yamazen U.S.A. v. Chicago and Northwestern Transp., supra*, in upholding the shorter period of one year to file suit since alternative rates were offered; and, (4) rejected the case relied upon by the shipper, *Consolidated Rail Corp. v. Sobeich*, 710 F.Supp. 988 (S.D.N.Y. 1989), as never have

been cited in a published opinion and which relied on two cases which were later reversed.

The latter case of *C.R. England and Sons Inc. v. Atchison T. & S.F.R. Co., supra.*, contained the same one year period to file suit. The District Court in Texas granted ATSF's motion for summary judgment, holding that suit was (1) not timely filed; (2) that alternative rates were offered in the carrier's exempt circular; and, (3) rejected *Consolidated Rail Corp. v. Sobeich, supra*, and followed the decision in *Yamazen U.S.A. v. Chicago & Northwestern Transp. Co., supra*, and *Bay State Shippers Inc. v. Atchison T. & S.F. R. Co, supra.*

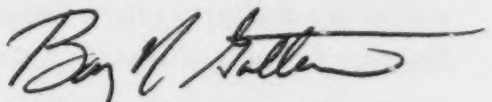
The Court of Appeals in the instant case did not hold that UP failed to provide alternative rates to Comsource. It acknowledged numerous dealings between the shipper and the carrier, as did the Court in *Bay State Shippers, Inc. v. Atchison T. & S.F.R. Co.*, and held that "Comsource is a sophisticated shipper with extensive prior dealings with UP." (App. B. at A-24). In addition, the panel did not address any case law discussing alternative rates in reaching its decision affirming the denial of UP's motion for summary judgment. In the case at bar, as in *Bay State Shippers* and *C.R. England* which follow the well established precedents of other circuits, alternative rates were offered and a one year period to file suit was not complied with by the shipper. Consequently, Comsource's action is time barred. It is critical that this court clarify the law applicable to exempt transportation agreements pursuant to the Staggers Amendment to the Interstate Commerce Act.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Dated: New York, New York
March 14, 1997

Respectfully submitted,



BARRY N. GUTTERMAN
Attorney for Petitioners
Union Pacific Railroad Company and Modesto & Empire Traction Company
Barry N. Gutterman & Associates
360 Lexington Avenue, 24th Floor
New York, New York 10017
(212) 983-1466

Of Counsel:
RAYMOND J. HASIAK
MICHAEL L. WHITCOMB

APPENDICES

APPENDIX A—OPINION OF THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. C92-4914CAL

United States District Court

Northern District of California

Before the Honorable Charles A. Legge, Judge

COMSOURCE INDEPENDENT FOOD SERVICE COMPANIES, INC., A GEORGIA CORPORATION,
Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, A UTAH CORPORATION, ET AL.,
Defendant.

AND RELATED CROSS-ACTIONS

San Francisco, California
Friday, April 1, 1994

For Plaintiff: **Law Offices of Andrew J. Skaff**
1999 Harrison Street, Suite 1300
Oakland, California 94612

By: Andrew J. Skaff, Esq.
Karen L. Peterson, Esq.

For Defendant Salvesen: **Thayer, Harvey, Hodder & Gregerson**
1100 Fourteenth Street, Suite F
P.O. Box 3465
Modesto, California 95353

By: Janet B. Hodder, Esq.

For Defendant Union Pacific: **Union Pacific Law Department**
5500 Ferguson Drive
Suite J
Los Angeles, California 90022

By: Scott R. Baugh, Esq.

Reporter by: James J. Yeomans, CSR
Official Court Reporter, USDC
Computerized Transcription by XSCRIBE

Friday, April 1, 1994
9:30 A.M.

The Clerk: Calling Civil 92-4914, Comsource Independent Food Service v. Union Pacific.

Ms. Hodder: Good Morning.
Janet B. Hodder on behalf of Christian Salvesen.

Mr. Baugh: Good Morning, Your Honor.
Scott Baugh for Union Pacific.

Mr. Skaff: Andrew Skaff for Plaintiff Comsource.

Ms. Peterson: Good Morning.
Karen Peterson Appearing for Plaintiff Comsource.

The Court: Counsel, I shudder to think of the quantity of money that you folks have been and will be spending over a $55,000 claim. Cannot you raise above principle and get the money?

Is there not some answer to this thing other than motions, arbitrations, rejection of arbitration awards, demand for jury trials, schedule three-day trials? This is nonsense.

Now, what are you doing? I don't understand it.

Is there some basic principle of constitutional law I'm missing here?

Between the three or four of you can't you divide up a $55,000 loss? Instead of that you're coming in and spending a multiple of that sum money.

Now, maybe somebody has got a right to attorney's fees at the end of this thing, but that doesn't answer the principle that justice is supposed to be reasonably accommodated in the amount of the dispute.

What's going on? I guess, sort of a futile statement.

Do you really want a three-day jury trial? I don't get it.

Well, having cast those are bad words upon the water, let me rule on the motion in front of me. This is the defendant Union Pacific's motion for summary judgment and, in

essence, wanting to invoke the one-year statute of limitations that's stated in the, I'll say, the tariffs, or contracts, or the waybills, or whatever word you want to use.

And I suppose the legal question that's presented here, is whether the Carmack, C-A-R-M-A-C-K, amendment which provides a two-year statute of limitations is effectively waived under the so-called Staggers, S-T-A-G-G-E-R-S, Amendment in 1980.

To make a long story short, I think what Union Pacific is doing here is standing the statute on its ear. Carmack, I believe, stands for the proposition that we start with a presumed two-year statute of limitations and, if nothing is done, that's the statute of limitations.

Now, Staggers allows the shipper to offer to the carrier, I should say, to offer to the shippers, an opportunity for some other terms, but what they've done is they said these are your other terms and these are going to be your terms unless you opt into Carmack and that's not what Carmack says.

The requirement of Carmack is that it's a two-year period unless the shipper agrees to something else. What Union Pacific has done is say it's a one-year period if you do nothing, that's not permitted by Carmack.

So, I realize there's authority on this question, but I lineup where the Carmack provision trumps as the starting point, so I'm going to deny the defendant's motion for judgment or for dismissal based on the statue of limitations.

Mr. Baugh: May I make one inquiry?

The Court: Yes.

Mr. Baugh: I understand that's the reason this Court—and the District Court of New York follows that reasoning, in this case there are these terms that are offered in this governing publication, the tariff.

The Court: What if the shipper doesn't do anything?

Mr. Baugh: They have to do something to initiate the shipment.

The Court: No. No. No, they don't. What if they don't operate under your tariff, your contracts, what's the statute of limitations?

Mr. Baugh: Your Honor, they operate by selecting the tariff.

The Court: By shipping?

Mr Baugh: That's how they do it. They call us up and they say, we want to ship this and they designate on the bill of lading, they say we want it shipped under the tariff, that's their selection, they could have opted at that point, either time.

The Court: If they do nothing, if they do nothing other than ship your goods and check off the waybills, what's the statute of limitations?

Mr. Baugh: See, it doesn't work that way.

The Court: Answer my question.

Mr. Baugh: It can't work that way.

The Court: Sure it does, exactly the way it works.

Mr. Baugh: No shipment can move until there's a designated set of terms that will govern the shipment.

The Court: I agree.

Mr. Baugh: So you say, what will they do if they do nothing, nothing will happen.

The Court: You don't give them a box that says check this for Carmack, check this, you don't give them a box. They've got to opt out of what you want and that's what Carmack says you can't do. You've got to give them Carmack, then the right to opt out of Carmack if they want to do that. You turned it around the other way.

Mr. Baugh: I understand you're following the reasoning in the New York Court.

The Court: Pardon my impatience, just that I just feel that there's really an abuse of the process going on here.

Now we're going to trial? We're going to a three-day jury trial, is that what were doing?

Mr. Skaff: Your Honor, on behalf of plaintiff—

The Court: What if we get a contribution from my clerks and me and paid the sum of $55,000, do we get rid of it that way? I'm being sarcastic. I hope it makes the point. What are you doing? No answer.

Mr Skaff: We certainly are willing to talk settlement, your Honor. We have been all along. I will commit on behalf of plaintiff to try to do what we can to reach that goal sometime before trial, but if we can't or we're no farther along than we are now, I guess, we are looking at a three-day jury trial.

The Court: Well, I don't know why I've got it on my notes this was going to be a one-day non-jury trial, your joint pretrial statement puts it at three-days jury.

Mr. Baugh: Your Honor, if I may make a statement here, I think the joint pretrial preserves everything. I'll make a representation on behalf of my client, I believe the other counsel would be willing to go through the pretrial statement and try to stipulate to certain facts to reduce it down to perhaps a one-day trial. We'll have to sit down and go through that.

Mr. Skaff: I concur in that. We see the case as being relatively simple.

The Court: We have to change the trial date now because it's a jury rather than a non-jury and

longer rather than shorter, so the may 2nd trial date will be vacated. New trial date will be June 20, three-day jury.

Mr. Skaff: Your Honor, I have a conflict for that entire two week period starting June 20th.

The Court: Try July 5th.

Ms. Hodder: Your Honor, I have a jury trial starting in Modesto on July 5th.

The Court: July 18th?

Ms. Hodder: That's fine.

Mr. Skaff: That's fine, Your Honor.

The Court: Now, Mr. Santos, will you give us a pretrial date in late June?

The Clerk: June 23 at 3:00 o'clock.

The Court: Then I'm going to make an immediate referral of this matter—you've been to arbitration, you haven't been to settlement discussions, I'm going to make immediate referral of this matter to the magistrate judges to convene a settlement conference.

Mr. Skaff: Your Honor, excuse me, the June 23rd date is going to be a problem also.

The Court: What do you want, the 22nd?

The Clerk: Why don't I set it for June 16th?

Mr. Skaff: June 16th would be fine.

The Court: Now, I'm going to refer it to the magistrate for settlement conference, and while you're

here in the building, please go to the office of the chief magistrate and tell him that an order of reference is coming and maybe while you're right here you can find out who it has been assigned to and a date for the settlement conference.

Mr. Skaff: Thank you, your Honor.

Ms. Hodder: Thank you.

(The above matter adjourned)

United States District Court

Northern District of California

Case No. 92-4914-CAL
Stipulated Judgment

COMSOURCE INDEPENDENT FOODSERVICE COMPANIES, ETC.,

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, etc., et al.,

Defendants.

AND RELATED CROSS-ACTIONS

The parties to this matter hereby enter into the following stipulated judgment:

1. Comsource Independent Food Services Companies, Inc. shall recover from Christian Salveson, Inc. the sum of $18,000.

2. Comsource Independent Food Services, Inc. shall recover from Union Pacific Railroad Company the sum of $18,000.

3. Christian Salveson, Inc. and Union Pacific Railroad Company shall take nothing on their cross-complaints.

4. By entering into this Stipulated Judgment, Union Pacific is reserving its right to challenge and appeal the Court's pre-trial ruling on Union Pacific Railroad Company's Motion For Summary Judgment.

5. All parties shall bear their own costs and attorney's fees.

Dated: March 8, 1995

Michael L. Whitcomb
Scott R. Baugh
Union Pacific Law Dept.
By /signature/
Scott R. Baugh
Attorneys for Defendant
Union Pacific Railroad
Company

Dated March 13, 1995

Law Offices of Andrew J. Skaff
Andrew J. Skaff
By /signature/
Andrew Skaff
Attorneys for Plaintiff,
Comsource Independent
Foodservice Companies, Inc.

Dated: March 14, 1995

Janet Hodder
Thayer, Harvey, Hodder &
Gregerson
By /signature/
Janet Hodder
Attorneys for Defendant
Christian Salvesen

IT IS SO ORDERED,

Charles A. Legge
/stamp/
Judge Charles A. Legge

Dated: March 23, 1995

APPENDIX B—ORDER OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT, DATED DECEMBER 16, 1996

United States Court of Appeals

for the Ninth Circuit.

COMSOURCE INDEPENDENT FOOD SERVICE COMPANIES, INC., a Georgia corporation, Plaintiff-Appellee,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah corporation, Defendant-Appellant.

No. 95-15826.

Appeal from the United States District Court for the Northern District of California; D.C. No. CV-92-04914-CAL. Charles A. Legge, District Judge Presiding. Argued and submitted August 15, 1996 - San Francisco, California. Filed December 16, 1996.

Before: Charles E. Wiggins and Stephen S. Trott, Circuit Judges, Sarah S. Vance*, District Judge. Opinion by Judge Wiggins.

OPINION

WIGGINS, Circuit Judge.

Union Pacific Railroad Company (UP), carrier for Comsource Independent Food Service Companies, Inc.

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* Hon. Sarah S. Vance, United States District Judge for the Eastern District of Louisiana, sitting by designation.

(Comsource), appeals the district court's denial of its motion for summary judgment. UP claims that the one year statute of limitations contained in a document titled UP EXEMPT 1-F (the "Tariff") bars this suit brought by Comsource approximately fourteen months after UP rejected Comsource's claim that a shipment of frozen vegetables were damaged while in UP's possession. We AFFIRM.

I.

Comsource is a member-owned cooperative, comprised of independently owned and operated food service and non-food distributors. Comsource frequently used UP for its shipment of food products. As part of their ongoing business relationship, on September 25, 1990, UP had sent Comsource a copy of the Tariff, which is on file with the Interstate Commerce Commission.[1] According to Item 7, Section 3(b) of the Tariff, the statute of limitations within which a shipper may file suit against the carrier is one year from the day the carrier gives notice in writing to the shipper of its denial of shipper's loss and damage claim.[2] Item 8 of the Tariff

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1 Comsource claims that UP sent the Tariff to Comsource "to no one's attention."

2 Section 3(b) of the Tariff reads:

> Suit for loss, damage, delay or injury to property described in this exempt bill lading may only be instituted against Union Pacific System or delivering carrier within one year from the day when notice in writing is given by Union Pacific System or delivering carrier that same or any part thereof specified in the notice of claim has been disallowed. Where claims are not filed and suits not instituted thereon according to the foregoing provision, none of the carriers shall be liable and such claims shall not be paid.

provides that a shipper may select terms set forth in 49 U.S.C. § 11707 (the "Carmack Amendment"), including the two year statute of limitations, for an additional charge. The amount of this additional charge. The amount of this additional charge is not specified in the Tariff and a shipper must call a toll free phone number to find out the amount.[3] UP also provided Comsource with a document entitled "UP-EBFF-3" (the "rate sheet") in January, 1991. The rate sheet incorporates the terms provided in the Tariff.[4]

On July 12, 1991, Comsource shipped a railcar of frozen vegetables from the warehouse of Christian Salvesen, Inc. ("Salvesen") in Modesto, California, to a warehouse facility in

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3 Item 8 of the Tariff reads:

> Shipper may, at his option, elect that the shipment move under the liability provisions set forth in 49 U.S.C. Section 11707 [the Carmack Amendment]. In the event of such an election, the shipper shall place the following notation on the bill of lading: "This shipment subject to liability provisions set forth in 49 U.S.C. Section 11707." An additional charge is assessed on shipments for which the shipper elects "Section 11707 liability." Information including the charges for "Section 11707 liability" can be obtained by calling our toll free phone numbers. Where the shipper elects the liability provisions set forth in 49 U.S.C. Section 11707, the period for bringing suit against any carrier will also be affected in the following manner: Any suit must be commenced within two years (rather than one year as provided elsewhere in this circular) from the date the carrier gives written notice that it has disallowed the claim or any part of the claim specified in the notice.

Tariff at 14

4 The first paragraph in the rate sheet provides: "Shipments made under these rates are subject to all rules and provisions contained in UP Exempt 1-Series Circular. . . ."

Independence, Missouri. To commence this shipment, Salvesen, acting as Comsource's agent,[5] first called Modesto and Empire Traction Company ("M & ET"), the short-line service provider, and asked them to send over a railcar. Salvesen loaded the railcar and faxed a bill of lading to M & ET.[6] On the bill of lading, Salvesen had typed the words "Letter Quote UP-EBFF-3 $3000.00[,]" which referred to the rate quoted on the rate sheet for shipments from California to the Kansas City area. A "Straight Bill of Lading" was also prepared by Salvesen for the same shipment.[7] The Straight

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5 In its Opposition to Motion for Summary Judgment, Comsource initially denied that Salvesen was acting as its agent but it provided no supporting evidence. In response, UP presented the bill of lading, which specified an employee of Salvesen as Comsource's "agent," as evidence that Salvesen was acting as Comsource's agent. In this appeal, Comsource does not deny that Salvesen was its agent and we treat Salvesen as such.

6 M & ET had previously provided Salvesen with the form for the bill of lading. A provision in it states that "every service to be performed hereunder shall be subject to all the conditions not prohibited by law, whether printed or written, herein contained, including the conditions on back hereof, which are hereby agreed to by the shipper and his assigns." It is unfortunate that we were not provided with a photocopy of the back side to this document especially in light of Salvesen's statement, in its Opposition to Union Pacific's Motion for Summary Judgement, that section 2(b) in "[t]he bill of lading which controlled the relationship of the parties in this action contained a two-year limitation period."

7 The form for the straight bill of lading was Salvesen's own. A provision in it reads, in pertinent part, as follows:

> [E]very service to be performed hereunder shall be subject to all the terms and conditions of the Uniform Domestic Straight Bill of Lading set forth (1) in Uniform Freight Classification in the effect on the date

Bill of Lading contains a detailed list of the shipment's content. The reason for having two types of bill of lading is not mentioned in the record. After examining the faxed bill of lading, M & ET shipped the railcar from Modesto to Stockton, where UP, the interstate carrier, took over the railcar and delivered it to its destination in Missouri. When the shipment arrived in Missouri, the vegetables were in damaged condition indicating that they had thawed and refrozen.

On September 3, 1991, Comsource filed a claim with UP regarding the damaged shipment but UP denied this claim in a letter dated October 30, 1991.[8] On December 18, 1992, fourteen months after the denial letter, Comsource filed suit against UP and Salvesen for damage to the shipment. On May 18, 1993, M& ET was added as a defendant. After judicial arbitration in October, 1993, in which Comsource was awarded $25,928, UP requested a trial. Prior to trial, UP and M & ET (collectively "UP" hereafter) filed a Motion for Summary Judgment. The motion was based on Comsource's

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hereof, if this a rail of a rail-water shipment. . . . Shipper hereby certifies that he is familiar with all the terms and conditions of the said bill of lading, set forth in the classification. . . which governs the transportation of this shipment, and the said terms and conditions are hereby agreed to by the shipper and accepted for himself and his assigns.

Note this does not necessarily incorporate the Tariff. The Uniform Domestic Straight Bill of Lading mentioned here contains a provision setting the statute of limitations at two years.

8 In this letter, UP states that temperature records of the railcar indicated that there was no mishandling. These temperature records indicate temperatures between +5 and -10 degrees Celsius when measured on July 13, 15, 16, 22 and 23 of 1991.

filing suit fourteen months after the original denial of Comsource's loss and damage claim. UP claimed that the one year statute of limitations period provided for in the Tariff barred the suit. The district court denied the motion in an order dated May 10, 1994. The court held that the Staggers Amendment to the Interstate Commerce Act required a carrier to first offer the two year statute of limitations period specified in the Carmack Amendment to the Interstate Commerce Act and then offer the shipper an opportunity to select other terms; here, however, UP offered non-Carmack terms first and then offered Carmack terms as an option. Jury trial commenced on January 31, 1995, but on the second day of trial, the district court declared a mistrial and the parties agreed to stipulated judgment entered on March 23, 1995.[9] As part of the stipulated judgment, UP reserved its right to challenge and appeal the court's pre-trial ruling on UP's Motion for Summary Judgment. This appeal followed.

II.

A denial of motion for summary judgment is generally not a final order, and is therefore not ordinarily appealable. *Jones-Hamilton Co. v. Beazer Materials & Servs., Inc.*, 973 F.2d 688, 693-94 (9th Cir. 1992). However, a denial of a summary judgment order is appealable after the entry of a final judgment. *Moran v. Aetna Life Ins. Co.*, 872 F.2d 296, 301 (9th Cir.1989). The denial of summary judgment in this case is

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The parties stipulated to Comsource's recovering $18,000 from Salvesen and $18,000 from UP, with each party bearing its own costs and attorney fees.

reviewable. *See Smigiel v. Aetna Casualty and Surety Co.*, 785 F.2d 922 (11th Cir.1986) (reviewing denial of summary judgment where parties entered a stipulated judgment before trial in which the defendant reserved the right to appeal the denial of summary judgment).

In reviewing summary judgment, we "must determine whether the evidence, viewed in a light most favorable to the nonmoving party, presents any genuine issues of material fact and whether the district court correctly applied the law." *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir.1995), *cert. denied*, 116 S.Ct. 1261, 134 L.Ed.2d 209 (1996); *see also Pomerantz v. County of Los Angeles*, 674 F.2d 1288, 1290 (9th Cir.1982) (same standard applies for review of denial of summary judgment). An issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505,2510, 91 L.Ed.2d 202 (1986).

III.

UP contends that the district court erred in interpreting the Staggers Amendment to require a carrier first to offer terms consistent with the Carmack Amendment and then to offer non-Carmack terms as an option. The district court held that UP first offered the one year non-Carmack statute of limitations and then gave Comsource the option to choose the Carmack term (two year limitations period) through provisions in the Tariff. Thus the court refused to apply the one year limitations period and denied UP's motion for summary judgment.

Before we consider the interpretation of the Staggers Amendment, however, we must first determine whether UP

did in fact offer the one year statute of limitations to Comsource. Here, Section 3(b) of the Tariff is the only provision among the documents exchanged between UP and Comsource which provides for a one year statute of limitations, and so the provisions in the Tariff must govern the shipment in question for the one year statute limitation to apply. Although tariff provisions required by law to be in the tariff ("mandatory" provisions) give constructive notice to the shipper, tariff provisions not required by law to be in the tariff ("non-mandatory" provisions), such as statute of limitations provisions, do not have this effect. The issue of what conditions need to be met for a statute of limitations provision in the tariff to bind the shipper is one of first impression. We hold that the shipper must have reasonable notice of a statute of limitations tariff provision because it is a non-mandatory provision. UP failed to set forth undisputed material facts that demonstrate that Comsource had reasonable notice of the two year statute of limitations.

Under the Interstate Commerce Act, a carrier subject to the jurisdiction of the Interstate Commerce Commission (ICC) must file with the Commission tariffs containing rates and other information related to those rates. 49 U.S.C. § 10762(a)(1) (1994).[10] The Carmack Amendment states, *inter*

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The text of 49 U.S.C. § 10762(a)(1), in relevant part, reads as follows:

> A carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title (except a motor common carrier) shall publish and file with the Commission tariffs containing the rates and (A) if a common carrier, classifications, rules, and practices related to those rates, and (B) if a contract carrier, rules and practices related to those rates,

alia, that a carrier may not provide for a period of less than two years for bringing a civil action in the tariff or by contract. 49 U.S.C. § 11707(e) (1994).[11] However the Staggers Amendment allows rail carriers to offer "alternative terms" and thus frees rail carriers from the strict application of the Carmack Amendment. 49 U.S.C. § 10505(e) (1994).[12]

Historically, a tariff on file with the ICC was construed to have the effect of a statute and give the shipper constructive notice of its terms. *See, e.g. Western Transit Co. v. A.C. Leslie & Co.*, 242 U.S. 448, 37 S.Ct. 133, 61 L. Ed. 423 (1917). This

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established under this chapter for transportation or service it may provide under this subtitle.

49 U.S.C. § 10762(a)(1) (1994).

11 The Carmack Amendment, in relevant part, reads as follows:

A carrier or freight forwarder may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date the carrier or freight forwarder gives a person written notice that the carrier or freight forwarder has disallowed any part of the claim specified in the notice.

49 U.S.C.§ 11707(e) (1994).

12 Section 10505(e) provides as follows:

No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering *alternate terms* nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

49 U.S.C. § 10505(e) (1994) (emphasis added).

prompted carriers to bury various limitations of liability provisions and other burdensome non-mandatory provisions in the tariff and to incorporate those provisions into the bill of lading by referring to the entire tariff, knowing that shippers rarely scrutinize all the terms in the tariff. *Swift Textiles, Inc. v. Watkins Motor Lines, Inc.*, 799 F.2d 697, 701 (11th Cir. 1986), *cert. denied*, 480 U.S. 935, 107 S. Ct. 1577, 94 L. Ed. 2d 768 (1987). Courts have since stepped in to limit the effect of such tariff provisions in certain circumstances.

Accordingly, we have held that the "filing of a tariff gives constructive notice of only those terms that are required by law to be filed." *Komatsu, Ltd. v. States S.S. Co.*, 674 F.2d 806, 811 n.7 (9th Cir. 1982) (citing *Port of Tacoma v. S.S. Duval*, 364 F.2d 615, 617 (9th Cir. 1966)). However, we have not yet decided on the necessary conditions for a non-mandatory provision, such as a statute of limitation provision, to bind the shipper.[13]

The Northern District of California has dealt with the binding effect of tariff provisions regarding statute of limitations incorporated in the bill of lading. In *State Farm Fire & Casualty v. United Van Lines*, 825 F.Sup. 896 (N.D. Cal. 1993), the court held that when a provision regarding the statute of limitations period is in the tariff, "incorporation of that lawful tariff in a bill of lading will serve to bind the

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A statute of limitations provisions is a non-mandatory provision. *See* 49 U.S.C. 10762(a) (1994); *Allstate Insurance Co. v. International Shipping Corp.*, 703 F.2d 497, 500 (11th Cir. 1983) (holding that statute of limitations provisions in the tariff "were not related to rates or charges and therefore were not required by law to be within the tariff").

shipper. . . where the shipper is provided a copy of that bill of lading [which explicitly reproduces the relevant provision] or otherwise *put on notice* of its terms." *Id.* at 901 (emphasis added).

The Eleventh Circuit also has made the distinction between mandatory and non-mandatory provisions. It held that mandatory provisions have the force of law while non-mandatory provisions do not bind the shipper if they conflict with typical provisions associated with the governing federal statutes and the shipper had no actual notice of the non-mandatory provisions. *Fine Foliage of Florida v. Bowman Transp., Inc.*, 901 F.2d 1034, 1041-43 (11th Cir.1990); *Swift*, 799 F.2d at 703. As stated by the Second Circuit, a non-mandatory tariff provision should not bind the shipper when it conflicts with federal statutes, because "[i]n accepting the short form [bill of lading], the shipper relies upon the fact that the long form, which is incorporated by reference, contains only the usual provisions which closely follow [the governing federal statute], unless there is some warning on the face of the short form of special terms or exceptions which differ from the [statute] provisions." *Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer*, 422 F.2d 7, 14 (2d Cir.1969), *cert. denied*, 397 U.S. 964, 90 S.Ct. 998 (1970).[14] In other words,

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Encylopaedia Britannica involved the Carriage of Goods by Sea Act and not the Interstate Commerce Act but the facts are similar to the present case—the short form bill of lading incorporated the tariff on file with a federal commission. *Encylopaedia Britannica* held that unusual provisions in the tariff which are "never specifically brought to the shipper's attention, and of which the shipper had no actual knowledge" will not have effect on the shipper. *Id.*

shippers are entitled to additional notice for tariff provisions differing from federal statutes because the existence of the statute itself will not provide any constructive notice for such provisions.

Although we have not dealt with this precise issue, *Hughes Aircraft Co. v. North Am. Van Lines, Inc.*, 970 F.2d 609 (9th Cir.1992), is instructive. In *Hughes*, we discussed a tariff provision limiting the carriers liability for property damage.[15] We held that "[t]he filing of a tariff *alone* does not limit the carrier's liability" — the shipper must also be given "*reasonable notice* of the liability limitation and the opportunity to obtain information necessary to making a deliberate and well-informed choice." *Id.* at 612 (second emphasis added). Thus, without "reasonable notice," the liability limitation provision in the tariff could not bind the shipper. We conclude that the same reasonable notice test is appropriately applied to non-mandatory provisions regarding statute of limitations.

The statute of limitations Tariff provision in the present case does not give the shipper constructive notice, because

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Under the Carmack Amendment, a carrier has liability for the full amount of property damage. 49 U.S.C. § 10707(a) (1994) ("The liability imposed under this paragraph is for the actual loss or injury to the property caused by [the carrier]. . ."). A carrier may, however, limit its liability by agreement with the shipper. 49 U.S.C. § 10730(a) (1994) ("The Interstate Commerce Commission may require or authorize a carrier. . . to establish rates for transportation of property under which the liability of the carrier for that property is limited to a value established by written declaration of the shipper, or by a written agreement. . . . ").

statute of limitations provisions are non-mandatory and the Tariff's one year statute of limitations provision conflicts with a federal statute-namely, the Carmack Amendment of the Interstate Commerce Act which requires a two year limitations period. Therefore, Comsource must have had reasonable notice that a one year statute of limitations would apply to the shipment in question for the Tariff provision to bind Comsource.

As the court in *State Farm* noted, "the caselaw is unclear on the exact parameters of the required notice." *State Farm*, 825 F.Supp. at 901. However, the holdings in related cases offer specific guidelines. Courts have considered the following factors: whether the provision in the tariff was "specifically brought to the shipper's attention," *Encyclopaedia Britannica*, 422 F.2d at 14; the shipper's "sophistication, abundant experience, or extensive prior dealings with a carrier[,]" *Carmana Designs v. North Am. Van Lines*, 943 F.2d 316, 321 (3d. Cir.1991); whether the shipper "drafted the contract and directly negotiated its terms[,]" *Hughes Aircraft*, 970 F.2d at 612; and whether the tariff provision was specifically reproduced in the bill of lading. *State Farm*, 825 F.Supp. at 901.

The situation in the present case is mixed: UP did not specifically bring the Tariff provision to the attention of Comsource; Comsource did not draft the bill of lading or negotiate its terms; as far as the record shows, the Tariff provision was not specifically reproduced in the bill of lading. However, it is unclear whether UP brought the Tariff provision to the attention of Salvesen, Comsource's agent; Comsource is a sophisticated shipper with extensive prior dealings with UP; and the agent Salvesen did prepare the bill

of lading, which refers to the rate sheet, which, in turn, refers to the Tariff.

Given the above, we determine that a reasonable jury could find in favor of Comsource. Therefore, the district court's denial of summary judgment was proper and we need not reach the issue of interpreting the Staggers Amendment.

IV.

For the foregoing reasons, we AFFIRM.

APPENDIX C—ORDER OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT, DATED JANUARY 30, 1997, DENYING THE PETITION FOR REHEARING AND REJECTING THE SUGGESTION FOR REHEARING EN BANC

U.S. Court of Appeals

for the Ninth Circuit

No. 95-15826
D.C. No. CV-92-04914-CAL

COMSOURCE INDEPENDENT FOODSERVICE COMPANIES, INC., a Georgia Corporation,
Plaintiff-Appellee,

v.

UNION PACIFIC RAILROAD COMPANY, a Utah Corporation,
Defendant-Appellant,

ORDER

Before: WIGGINS and TROTT, Circuit Judges, VANCE,* District Judge.

The Panel has voted to deny the petition for rehearing. Judge Trott votes to reject the suggestion for rehearing en banc and Judges Wiggins and Vance so recommend.

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* Hon. Sarah S. Vance, United States District Judge for the Eastern District of Louisiana, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Supreme Court, U.S.
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No. 96-1465

In The

Supreme Court of the United States

October Term, 1996

UNION PACIFIC RAILROAD COMPANY and MODESTO AND EMPIRE TRACTION COMPANY,

Petitioners,

-against-

COMSOURCE INDEPENDENT FOODSERVICE COMPANIES, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

GEORGE CARL PEZOLD
RAYMOND A. SELVAGGIO
AUGELLO, PEZOLD & HIRSCHMANN, P.C.
120 Main Street
Huntington, New York 11743
Telephone: (516) 427-0100

ANDREW J. SKAFF
KAREN L. PETERSON
Counsel of Record
KNOX RICKSEN
1999 Harrison Street, Suite 1700
Oakland, California 94612
Telephone: (510) 893-1000

Attorneys for Respondent, Comsource Independent Foodservice Companies, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

15 pp

QUESTION PRESENTED

Whether a rail common carrier must provide a shipper with reasonable notice, an option to select full liability terms and a choice of rates when offering "alternative terms" pursuant to 49 USC 10505(e).

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STATEMENT OF THE CASE

The "Carmack Amendment", originally enacted in 1906, created uniformity and stability in the law of loss or damage to goods in interstate transportation. It codified the common law that carriers are liable for full actual loss, unless a shipper voluntarily agrees in writing to a limitation of liability in return for a reduction in the freight rate; it created joint and several liability as to the receiving and delivering carriers, and it established minimum time limits for the filing of claims (9 months from delivery) and the commencement of suits (2 years from declination). Notwithstanding widespread acceptance of these principles, litigation still arises in two general areas: limitations of liability and time limits for claims and suits.

This case involves an attempt by UP to enforce a one-year time limit for bringing suit which was set forth in an unfiled tariff, "UP Exempt 1-F", and which was allegedly incorporated by reference in shipping documents.

UP contends that it was not subject to the minimum 2-year time limit specified in the Carmack Amendment. It points out that the commodity transported was exempt from economic regulation under 49 USC § 10505, and therefore subject to Section 10505(e) which provides:

> (e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the

> authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

The language of this section is clear: rail carriers are subject to section 11707 (Carmack), but they may offer "alternative terms". Thus, it would be a reasonable presumption that Carmack terms and conditions would apply to a movement, unless the rail carrier actually offers alternative terms and the shipper agrees to accept them.

The Ninth Circuit essentially applied common law principles of reasonable notice and contract law. It weighed the facts before it and concluded that UP had failed to meet its burden of proving that it had given the shipper proper notice of the short time limit and the Carmack liability option. Stated differently, the shipper had not accepted the carrier's offer of alternative terms.

The Ninth Circuit correctly applied the law.

ARGUMENT

1. The UP exempt circular did not contain an alternative rate for Carmack liability

UP argues that "the sole question should be whether the provisions in its governing publication or exempt circular offered alternative rates for the shipment . . . " UP also states " . . . UP offered alternative rates for the shipment. However, this issue was not addressed by the panel . . . " (Brief p. 12)

In the case at bar, the bill of lading contained a notation referencing "Letter Quote UP EBFF-3". UP EBFF-03 is the alphanumeric code for the Eastbound Frozen Food Rate Sheet No. 3. This rate sheet states that the rates contained therein are subject to the provisions contained in two other documents, namely UP Exempt 1-Series Circular and UPFE Exempt 1-Series Circular. The Governing Publication to the UP Exempt Circular contained, *inter alia*, reference to the shortened time limit which UP sought to enforce. [ER 5, pp. 107-109, CR 53]

The UP circular does not contain *any* rate or premium for Carmack liability. Item 8 of UP Exempt 1-F contains only the cryptic statement: "Information including the charges for 'Section 11707 liability' can be obtained by calling our toll free phone numbers." There is no phone number listed in the Item. [ER 2, p. 25; CR 54, p.19] Even if the shipper knew to look at this document, it would not be able to determine the rate for Carmack liability.

2. UP is a common carrier

UP suggests (Brief pp. 12-13) that the traditional legal principles and court decisions dealing with common carriers are inapplicable because the shipment was "deregulated" or "exempt" from economic regulation. This is a red herring.

UP is a common carrier. A common carrier is one which holds itself out to the general public to provide transportation services. The fact that the ICC has administratively exempted certain rail traffic from economic rate regulation does not change the nature of the carriage. *Quasar Co. v. Atchison, T. & S.F. R. Co.*, 632 F.Supp. 1106,

1113 (N.D.Ill. 1986); *Co-Operative Shippers, Inc. v. Atchison, T. & S.F. R. Co.*, 613 F.Supp. 788, 792 (N.D. Ill. 1985), aff'd in part, rev'd in part, 840 F.2d 447 (7th Cir. 1988). *See also, Hughes Aircraft Co. v. North American Van Lines, Inc.*, 970 F.2d 609, 613 (9th Cir. 1992); *Railroad Co. v. Lockwood*, 84 U.S. (17 Wall.) 357, 21 L.Ed. 627 (1873).

3. The panel correctly focussed on the notice issue

UP argues that "The panel applied inapplicable cases which related to whether notice was given to the shipper by UP concerning the condition precedent . . . " (Brief p. 13)

The panel may not have employed proper transportation law "words of art" in referring to UP's circular as a "tariff" or the time limit as a "statute of limitations". However, it was correct in focussing on the issue of *notice*.

If the UP circular had been on file with the ICC as a tariff, shippers would have been deemed to have constructive notice of its provisions. Cf. *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990). However, it was not filed with ICC or anywhere else which would have constituted official public notice.

The fact that it was an unfiled "tariff" makes the question of notice a critical issue. Constructive notice can not be presumed. The panel properly concluded – on the facts before it – that UP failed to meet its burden of proving that it had given the shipper adequate notice of

its short time limit provision and the option to obtain Carmack liability coverage.

Generally, when one offers an alternative choice to a main proposition, the alternative must be the object that is affirmatively accepted or rejected. In the context of Section 10505(e), when offering differing terms to a shipper, it is the Carmack terms which are the main proposition and the terms allowed under Staggers must be the alternative. Drafting contract terms to the contrary turns the statutes on their head. *See Consolidated Rail Corporation v. Sobiech*, 710 F.Supp. 988 (S.D.N.Y. 1989) ("*Sobiech I*"); *Fruitco Corporation v. Consolidated Rail Corporation*, 118 Misc.2d 1090, 462 N.Y.S.2d 754 (N.Y. City Civ. Ct. 1983).

In *Sobiech I*, the court held that:

> Section 10505(e) requires carriers to provide terms consistent with Carmack in the first instance. They may offer terms alternative to Carmack, which may be accepted or rejected by the shipper. But, in any event, unless the shipper affirmatively elects the alternative limited liability terms, the Carmack terms should apply.

710 F.Supp. at 990.

4. UP's reliance on Co-Operative Shippers and Yamazen is misplaced

UP argues that its shipping contract provided a meaningful choice in accordance with § 10505(e). In support of its position, UP relies upon two decisions by the Seventh Circuit Court of Appeals: *Co-Operative Shippers, Inc. v. The Atchison, T. & S.F. R. Co.*, 860 F.2d 447 (7th Cir. 1988), and *Yamazen U.S.A., Inc. v. Chicago & Northwestern*

Transp. Co., 790 F.2d 621 (7th Cir. 1986). These cases, however, do not represent a majority view and have been rejected by other courts. *See Consolidated Rail Corp. v. Ted Sobiech Farms*, 717 F.Supp. 1062 (S.D.N.Y. 1989) ("*Sobiech II*"), wherein Judge Edelstein rejected ConRail's attempt to overturn his previous decision (*Sobiech I*) based on the Seventh Circuit precedent relied upon by Defendant herein.

> As a preliminary matter this court is not bound by the prevailing precedent in the Seventh Circuit. . . . This court found, and still believes, that the Seventh Circuit's interpretation of the Carmack Amendment is not persuasive.
>
> Moreover, the plaintiff has submitted a slip opinion from the Northern District of Illinois acknowledging the prevailing rule in the Seventh Circuit. **Interestingly, Judge James B. Moran, the author of that opinion, concurs that the Seventh Circuit apparently stands alone in its view of the Carmack Amendment's effect. He writes: "This case presents a perfect example of the 'trap' set by a form contract which requires shippers to affirmatively elect full coverage in a deregulated shipment contract. Although the ICC, and other courts, have serious trepidations about such limitations, the Seventh Circuit disagrees."** ***Quasar Company v. Atchison, Topeka & Santa Fe Railway Co.*****, No. 88 C. 4617, Slip Op. at 6 (April 27, 1989). This court joins the "other courts" that have serious trepidations of the Seventh Circuit's view.**

Id. at 1063 (emphasis added).

In any event, the Seventh Circuit cases relied upon by UP are distinguishable from the instant case.

ComSource was quoted a ***single*** rate for the shipment in issue. It was never informed that it had the option to choose a different rate or different terms of liability. Thus, even if the provisions of Item 8 were deemed to comply with § 10505(e), the short time limit is unenforceable because ComSource had no knowledge of this provision and consequently never had the opportunity to make a choice, much less an informed choice. In this context, UP's reliance upon the Seventh Circuit cases is misplaced.

In *Co-Operative Shippers, supra,* Co-Operative and Santa Fe conducted extensive negotiations which lasted almost three months before the contract was finally executed. Indeed, Co-Operative acknowledged that in reviewing the contract it ignored the limitations of liability set forth therein. Based on the extensive contract negotiations that took place, the court held that Co-Operative had sufficient notice of the carrier's liability limits and a **fair opportunity** to obtain greater protection. The court expressly stated, "**[t]his is not a case in which a carrier sought to limit its liability by mere implication. Instead, Co-Op made a well, informed, deliberate and absolute choice.**" 840 F.2d at 451 (emphasis added).

Notably absent from the court's opinion in *Co-Operative Shippers* is any discussion about binding a shipper based on the doctrine of constructive notice. Indeed, the court observed quite the opposite where it stated that "[t]his is not a case in which a carrier [seeks] to limit its liability by mere implication." Thus, even under the reasoning in *Co-Operative Shippers,* if the language of the tariff were deemed to meet the requirements of Section 10505(e), this is negated by the fact that ComSource was

never given a reasonable opportunity to review this provision. Clearly, based on the facts in this case, Defendant's reliance upon *Co-Operative Shippers* is misplaced.

Defendant's reliance upon *Yamazen, supra,* is also unavailing. In that case the shipper filed suit two years and seven month after its claim was disallowed by the railroad. Thus, the court found that the shipper's suit was time-barred under the Carmack Amendment.

5. The panel correctly applied the principles enunciated in Hughes Aircraft

UP questions the panel's reliance on *Hughes Aircraft, supra,* noting that the decision in *Hughes Aircraft* upheld the carrier's limitation of liability. (Brief p. 14)

In *Hughes Aircraft,* there was a negotiated, written, bilateral contract which expressly incorporated the terms of the carrier's tariff which was on file with the ICC. The *Hughes Aircraft* court found – on the facts before it – that the shipper had "reasonable notice and an opportunity to make a deliberate, thoughtful choice in selecting North American's liability limit . . . " *Hughes Aircraft* at 612.

In the case at bar – based on the facts before it – the panel has found to the contrary.

6. The Bay State Shippers and C.R. England cases are distinguishable

UP refers to two district court decisions: *C.R. England and Sons, Inc. v. Atchison, T. & S.F. R. Co.,* 924 F.Supp. 757 (N.D. Tex. 1996), and *Bay State Shippers, Inc. v. Atchison, T.*

& S.F. R. Co., 1995 U.S.Dist. Lexis 20154, 1995 WL 865481 (C.D. Cal. 1995). (Brief p. 15) Both of these cases involved an exempt circular published by the Atchison, Topeka & Santa Fe Railroad.

A close reading of *Bay State Shippers* and *C.R. England* reveals that the language of the ATSF exempt circular is significantly different from the language of the UP circular involved in the case at bar. Specifically, the ATSF Circular Intermodal No. 1 provided that "If the shipper elected liability terms consistent with the Carmack Amendment, it would pay an additional charge of five percent of the applicable freight charges assessed, or $100 per shipment, whichever is greater." *Bay State*, slip op. @ 2. In other words, the rate for Carmack liability was clearly spelled out in the ATSF circular.

As noted above, in the case at bar, the UP circular does not contain *any* rate or premium for Carmack liability, only the cryptic statement: "Information including the charges for 'Section 11707 liability' can be obtained by calling our toll free phone numbers." No one, looking at this document, could be able to determine the rate for Carmack liability.

CONCLUSION

The Ninth Circuit correctly interpreted the facts and applied common law principles of reasonable notice and contract law. The petition for certiorari should be denied.

Dated: Huntington, New York
April 16, 1997

Respectfully submitted,

GEORGE CARL PEZOLD
RAYMOND A. SELVAGGIO
AUGELLO, PEZOLD & HIRSCHMANN, P.C.
120 Main Street
Huntington, New York 11743
Telephone: (516) 427-0100

ANDREW J. SKAFF
KAREN L. PETERSON
Counsel of Record
KNOX RICKSEN
1999 Harrison Street, Suite 1700
Oakland, California 94612
Telephone: (510) 893-1000

Attorneys for Respondent, Comsource Independent Foodservice Companies, Inc.